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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Implementation of the)	
Telecommunications Act of 1996:)	CC Docket No. 96-115
)	
Telecommunications Carriers' Use of)	
Customer Proprietary Network Information)	
and Other Customer Information)	
)	
Implementation of the Non-Accounting)	
Safeguards of Sections 271 and 272 of the)	CC Docket No. 96-149
Communications Act of 1934, as Amended)	

**BELLSOUTH REPLY TO COMMENTS
ON PETITIONS FOR RECONSIDERATION**

BellSouth Corporation, for itself and on behalf of its affiliated companies (collectively "BellSouth"), hereby submits this Reply to comments on the petitions for reconsideration or other relief from various aspects of the Commission's *Second Report and Order*¹ filed in the above captioned proceeding.

I. The Comments Confirm That the Electronic Audit Requirement Should be Reconsidered and That an Interim Stay is Needed Now

In a display of solidarity that is increasingly uncommon these days, parties from all segments of the industry emphatically reaffirmed that the electronic audit requirement should be eliminated on reconsideration. The requirement has been shown to impose costs and other

¹ *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket Nos. 96-115, 96-149, Second Report and Order and Further Notice of Proposed Rulemaking, FCC 93-27 (rel. Feb. 26, 1998) ("*Second Report and Order*" or "*Order*").

burdens on carriers well beyond those apparently assumed by the Commission.² Moreover, these costs are to be incurred to produce speculative benefits that are extremely marginal at best and that, in any event, can be achieved through materially less burdensome means. Accordingly, this requirement should be eliminated on reconsideration.

Although a few petitioners suggested modifications to the electronic audit requirement that might alleviate some of the burdens it imposes, such as application only to certain categories of systems, BellSouth agrees with those who believe that anything short of full elimination of the requirement at this point would be inappropriate.³ First, as AT&T confirms, even a requirement limited to certain types of systems will still impose substantial initial and recurring costs.⁴ Second, such a modification would do nothing to correct the requirement's principal deficiency – *i.e.*, that it produces no cognizable benefit that cannot be achieved through significantly less costly and less burdensome means.⁵ Third, as a number of petitioners pointed out,⁶ the Commission provided inadequate notice of the proposed rule in the first instance, and any modification of the requirement on reconsideration would still suffer from the same procedural infirmity.

Accordingly, if the Commission nevertheless remains inclined to impose some form of electronic audit requirement, it must do so only following appropriate notice and cost/benefit

² *Id.* at ¶ 199.

³ AT&T Comments at 15-16; Sprint Comments at 8; Frontier Corp. Comments at 2-4; SBC Comments at 18-19.

⁴ AT&T Comments at 15-16.

⁵ *Id.* at 16; Bell Atlantic Comments at 12.

⁶ AirTouch Comments at 5; E.Spire Communications at 6; Ameritech Comments at 3.

analysis, not by modification of an overly burdensome requirement adopted without adequate notice. In the interim, the Commission must eliminate the current requirement.

Moreover, relief is needed now, notwithstanding that the requirement is not effective until January 26, 1999. In order to meet this deadline, carriers are having to dedicate significant resources (both monetary and human capital) to this project, including the modification of systems that are scheduled for retirement or replacement not long after the deadline. Several parties have expressed concern over the drain such a requirement could impose on Year 2000 compliance efforts.⁷ Where expertise is not available in house, carriers are also having to sign contracts with outside vendors for necessary systems work. These commitments and expenditures are necessary *now* to meet the implementation deadline in January. Worse, these expenditures will prove to be wasted if the Commission decides, as it should, to eliminate or modify its requirement on reconsideration.

Under these circumstances, BellSouth again urges the Commission to act on its own motion to stay the electronic audit requirement pending reconsideration,⁸ and to do so promptly. Based on the record developed on reconsideration, BellSouth believes there is a strong possibility that the Commission will eliminate, or at least revise, its requirement. The Commission has previously concluded that a stay is an appropriate regulatory tool to avoid potential economic waste by carriers, particularly if there is a likelihood that the subject

⁷ AT&T Comments at 14; AirTouch Comments at 5-6; Bell Atlantic Comments at 12.

⁸ Action on the Commission's own motion is appropriate in light of the substantial supporting record already developed and the absence of any opposition. Moreover, the subject of the stay would not be a substantive provision of the Commission's rules but an implementation safeguard, the objective of which would continue to be met by other safeguard provisions. Thus, the public interest would not be adversely affected by such a stay.

requirement may be modified on reconsideration.⁹ The record presents such a circumstance in the instant case. Accordingly, the Commission should stay the electronic audit requirement pending its reconsideration of that requirement.

II. The Commission Should Not Reconsider Its Conclusion Regarding the Interplay of Sections 272 and 222.

AT&T, MCI, and a few others¹⁰ continued in their comments to urge the Commission to ignore the balance that Congress struck in Section 222 between competitive and customer privacy interests. Instead, these parties would have the Commission interpret Section 222 as applying not to “every telecommunications carrier,” as its express terms dictate, but to “every telecommunications carrier other than the BOCs.” Congress clearly did not intend such a reading in Section 222, and Section 272 neither supports it nor requires it. Accordingly, these parties’ requests for reconsideration of this issue must be rejected.

As BellSouth and others noted,¹¹ the Commission specifically and properly concluded that the policy goals of *both* Sections 222 and 272 would be accommodated by the interpretation adopted, while the interpretation advocated by the IXC’s would undermine the customer control, convenience, and privacy principles of Section 222. Thus, it is the IXC’s own selfish

⁹ *cf.*, *Rules and Policies Regarding Calling Number Identification Service -- Caller ID*, 10 FCC Rcd. 13819, 13819 (1995) (“Interested parties have persuasively argued that no matter how the issues raised in BellSouth’s Reconsideration Petition are resolved, and even if the Commission adheres to its original decision in every material respect, complying with these rules prior to the resolution of issues raised in the *Third Notice* impose costly and inefficient expenditures for network upgrades.”)

¹⁰ Sprint finds itself wriggling in the crosshairs, trying to justify more onerous application of Section 222 to BOCs while fending off claims that its own ILEC operations should also be subjected to stricter rules. Sprint Comments at 5-8. Sprint’s squirming only serves to reinforce that Section 222 should be applied according to its terms to “every telecommunications carrier,” and should not be carved up and applied differently to different industry segments.

¹¹ US West Comments at 6; Bell Atlantic Comments at 3-5.

interpretation that would “gravely weaken”¹² the CPNI protections of Section 222 by sacrificing Congressionally protected customer privacy interests in favor of the IXCs’ own private gain. The Commission gave proper deference to *all* of the policy objectives embodied in Sections 272 and 222 and reached the appropriate conclusion. No reconsideration is warranted.

Moreover, the IXC’s allegations of unfair competitive advantage have been shown to be without merit. Even MCI concedes that “[t]he heart of the competitive struggle that Section 222 is intended to address is marketing by carriers attempting to break into new markets and thus aimed at new prospects (*sic*).”¹³ Yet, as BellSouth and others pointed out,¹⁴ under the Commission’s *Order*, a BOC’s Section 272 affiliate cannot use BOC CPNI “to break into new markets [or] aim[] at new prospects” *without prior approval of the customer*. Absent such approval, the Section 272 affiliate will be trying to break into the IXC market by aiming at all new prospects, but without the benefit of *any* CPNI, while competing against entrenched IXCs who maintain data warehouses full of valuable, historical usage data. Clearly, the BOC affiliate does not have the unfair competitive advantage.

Even if the Commission were so inclined to revisit this issue, however, BellSouth agrees with US West¹⁵ that the Commission would be obligated to address the role of Section 272(g) in assessing the impact of the nondiscrimination obligation of Section 272(c). In the *Order*, the Commission found it unnecessary to address Section 272(g) and other arguments in support of its conclusion.¹⁶ Those arguments showed that because Section 272(g) is an express exception to

¹² MCI Comments at 1.

¹³ MCI Comments at 5 (citations omitted).

¹⁴ SBC Comments at 9; Ameritech Comments at 9-10.

¹⁵ US West Comments at 6.

¹⁶ *Order* at n. 564.

the nondiscrimination obligation of Section 272(c), a BOC is permitted to share CPNI in joint marketing with a Section 272 affiliate without incurring a nondiscrimination obligation toward other IXCs. Hence, even if the Commission revisits its analysis, the fundamental result is the same – BOCs are not precluded from, or otherwise specially encumbered in, sharing CPNI with their Section 272 affiliates.

III. The Commission Should Conclude That All Carriers May Use CPNI Absent Affirmative Approval To Market Associated CPE and Information Services

Parties continued to make the compelling case that CMRS carriers should be permitted to use CPNI to market CPE and information services without affirmative customer approval,¹⁷ and no party has contended otherwise. Instead, a number of parties have attempted to jump on the CMRS coattails and to argue that they, too, should be permitted to so use CPNI, but that the Commission should retain the prohibition for BOCs or, more broadly, for ILECs. BellSouth does not dispute that the prohibition should be lifted for *all* other carriers in addition to CMRS providers, but adamantly opposes discriminatory application of the prohibition among non-CMRS providers.

As BellSouth and others have shown,¹⁸ customers of wireline carriers do not make information privacy distinctions on the basis of whether a communications capability is considered by regulators to be a telecommunications service, an information service, or CPE. Customers reasonably consider their telecommunications service to include all of the functionality and equipment obtained from a carrier to make a telephone service work or work better. At a minimum, CPE and information services are as “necessary to and used in” the

¹⁷ Arch Communications at 3-4; Cable & Wireless Comments at 9-11; Frontier Corp. Comments at 5.

¹⁸ SBC Comments at 5-6.

provision of telecommunications service as are directory publishing and inside wire.

Accordingly, the Commission should conclude that wireline carriers, like CMRS providers, should be permitted to use CPNI to market CPE and information services without affirmative customer approval.

Even AT&T agrees “that there is a relationship between CPE and information services, respectively, and the underlying basic service.”¹⁹ The distinction AT&T attempts to draw between ILECs and non-ILECS thus is not based on customers’ expectations of what their telecommunications services include, but on self-serving claims of likely abuse of market power by large ILECs were they to have the same CPNI rights as other carriers. Aside from the fact that the Commission has already considered and rejected particularized application of its CPNI rules,²⁰ AT&T’s assertions that ILECs will “leverage their local market power into the competitive CPE and information services markets”²¹ are purely chimerical and have been shown in real life to have no factual basis.

Years of actual experience disprove AT&T’s speculative assertion. Before the 1996 Act and the Commission’s *Order*, no ILECs were subject to a prior CPNI approval requirement, yet the CPE and information services industries are among the most competitive in the nation’s economy. AT&T and others have offered no reason to explain why ILECs are now in sudden need of strict control. Accordingly, these conjectural arguments for distinguishing between ILECs and other wireline carriers must be rejected.

¹⁹ AT&T Comments at 10.

²⁰ *Order* at ¶ 49.

²¹ AT&T Comments at 11.

As an alternative tack, AT&T attempts to justify a distinction by suggesting that the prohibition represents a "step backwards" for non-ILEC carriers and thus "deprives consumers of seamless telecommunications offerings,"²² implying that non-ILECs alone (and, consequently, only *their* customers) are adversely affected by the current prohibition. As just noted, however, *all* carriers and their respective customers are equally affected. Even BOCs, who were subject to previous CPNI rules, were generally not precluded from using CPNI to market CPE and information service without prior approval. The Commission's *Order* thus presents a step backwards for *all* carriers and deprives all consumers of seamless telecommunications offerings.

That all carriers and their respective customers are equally affected adversely by the current prohibition provides grounds for removal of the prohibition for all carriers; it does not form a basis for selective application. The Commission should reject AT&T and others' requests for disparate treatment and should eliminate the prohibition for all carriers.

IV. The Commission Should Eliminate The Prohibition on Use of CPNI in Winback Situations

The comments reinforced the substantial consensus developed in the petitions that the prohibition on use of CPNI in winback situations is contrary to the competitive goals of the Act, among other deficiencies. While parties again asked for reconsideration of that prohibition, some, as above, attempted to distance themselves from ILECs, asserting that special CPNI prohibitions may be appropriate for ILECs. Closer review of these assertions confirms, however, that the concern lies not with use of CPNI, but with use of carrier proprietary information. Accordingly, the Commission should lift the prohibition on use of CPNI in winback situations for all carriers.

²² AT&T Comments at 11.

For example, as MCI acknowledges, the concern with the prospect of winback relief for ILECs stems not from an ILEC's use of information it has about its relationship with its customers, but from information an ILEC may have about a customer's actual or potential relationship with another carrier and which the ILEC obtains in the course of fulfilling its obligations to accommodate that relationship. MCI asserts that this information is carrier proprietary information and that "the winback prohibition is only necessary on account of ILECs' misuse of carrier proprietary information."²³ However, what MCI is advocating is not a CPNI winback restriction at all, but a prohibition on ILECs' use of carrier proprietary information for the ILEC's own marketing practices – a prohibition already contained in Section 222(b). And, as BellSouth pointed out previously, MCI itself has acknowledged that carriers should be able to negotiate their respective rights to information governed by Section 222(a) or 222(b).²⁴

Moreover, issues of whether information is CPNI or carrier proprietary information are no longer relevant *after* the customer has left and has begun taking service from another carrier. The information the original carrier retains about the services previously provided to the customer in no way relates to the customer's relationship with the new carrier. Thus, even Sprint (and apparently MCI) agree that the winback prohibition should be revisited to allow all carriers, including ILECs, to use CPNI to *regain* former customers that have already been switched to

²³ MCI Comments at 15.

²⁴ See, e.g., MCI Comments on Further Notice of Proposed Rulemaking, CC Docket 96-115 (filed March 30, 1998) at n.6 ("Nothing in Section 222 appears to limit carriers' abilities to voluntarily provide greater, or accept less, protection for [carrier proprietary] information pursuant to contract than that afforded by Section 222(a) and (b)."); *id.* at 16 ("Businesses are used to having to safeguard others' confidential information, including competitors' information, and almost all of the relationships that cause carrier proprietary information to be provided to other carriers, such as resale, are governed by contracts that contain strict confidentiality provisions.").


another service provider.²⁵ For these reasons, the Commission should eliminate the restriction on use of CPNI for winback marketing purposes for all carriers, including ILECs.

CONCLUSION

BellSouth respectfully requests the Commission to reconsider the *Second Report and Order* to the extent and for the reasons described herein and in BellSouth's Petition and to promptly stay the electronic audit requirement pending reconsideration.

Respectfully submitted,
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²⁵ Sprint Comments at 4.

CERTIFICATE OF SERVICE

I do hereby certify that I have this 8th day of July, 1998, served all parties to this action with a copy of the foregoing BellSouth Reply to Comments on Petitions for Reconsideration by placing a true and correct copy of same in the United States Mail, postage prepaid, addressed to the parties listed below:

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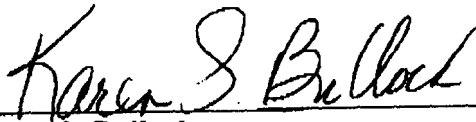
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